

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2003-704

December 19, 2003

CENTRAL MAINE POWER COMPANY  
Request For Exemption From the Town of  
Kittery's Zoning Regulations

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

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**I. SUMMARY**

By this Order, we grant Central Maine Power Company (CMP) an exemption, pursuant to 30-A M.R.S.A. § 4352(4), from the requirement that CMP obtain a special exception in accordance with the Town of Kittery's Land Use and Development Code Zoning Ordinance in order to build a new transmission line within the Town of Kittery.

**II. BACKGROUND**

In a case decided last summer, we approved a stipulation that resolved a ten-person complaint concerning the need and proper location of CMP's proposed transmission line construction project in southern York County. *Laurie Downs et al. v. Central Maine Power Company*, Docket No. 2002-665 (Aug. 14, 2003) (the "complaint case"). The project involved construction of a new substation in Kittery, other substation upgrades, and a new 34.5 kV (designed for future operation at 69kV) transmission line from Kittery into York. CMP stated that the project was necessary to provide additional transmission capacity and reliability, especially in Kittery and York. Many of the local communities participated in the proceeding, including the Towns of York and Kittery.

The complaint was filed because the complainants questioned the need for the new transmission line, and whether CMP's proposal was the best, or even a reasonable alternative, to meet the need. After technical conferences and discovery, the Advisory Staff and the OPA filed reports that agreed with CMP that a transmission upgrade was needed and discussed (in the case of the OPA, recommended one of) the alternatives available to CMP.

In May, the Commission held a public witness hearing in York. Many residents of York, and some from Kittery, voiced their concerns about CMP's preferred alternative, known as Option 2. As initially proposed, Option 2 involved building a new transmission line from the Bolt Hill substation in Eliot to a new substation in Kittery, continuing the new line from Kittery to York, primarily along the Maine Turnpike, along Route 1 for a short distance (about ½ mile), along the Little River in an existing but unused right of way, and ultimately terminating at an existing substation in York Harbor. The new line would convert the radial lines serving Ogunquit, York Beach and York Harbor into a transmission loop. Likewise, the new Kittery to York line would prevent the Bolt Hill line to the new Kittery substation from being a radial line.

The vast majority of persons who testified at the public witness hearings who stated a location preference preferred the route known as Option 3. Option 3 involved upgrading the existing transmission line from Quaker Hill to Ogunquit and onto York Beach and York Harbor, and building a second transmission line within the same but expanded corridor. Many persons stated concerns about Option 2, including the desire to avoid the protected area around the York River west of the Turnpike, the proximity of the Little River corridor to residential areas and an elementary school, and noise and other aesthetic concerns raised by the line along the Turnpike and the Turnpike Spur Road. One person who lived along the transmission corridor from Ogunquit to York Beach objected to Option 3.

In June, CMP filed rebuttal testimony and a response to the Staff and Intervenors Reports. In its testimony and report, CMP further analyzed Option 3, and further refined Option 2 by taking into account the public comments and concerns and making changes to mitigate these concerns. The "further refined" Option 2 was called "CMP's Preferred Option." CMP estimated the cost of its Preferred Option to be \$12.7 million. It estimated the cost of the properly designed Option 3 to be about \$22.5 million.

The Commission's Advisory Staff convened a technical and settlement conference shortly after CMP's rebuttal filing. CMP noted two significant drawbacks to Option 3:

1. While using the existing transmission corridor to build another transmission line would provide a loop for greater service reliability in Ogunquit and York, the new line from Bolt Hill to the Kittery substation would remain a radial line, and therefore would be less reliable, and
2. Option 3 would cost significantly more than Option 2.

CMP also noted that Option 2 was modified to become CMP's Preferred Option in order to accommodate local concerns.

At the settlement conference, the parties and the Commission Staff worked out the principles around which a settlement could be structured. Two weeks later, CMP filed a Stipulation, which was signed by CMP, the Public Advocate, Laurie A. Downs, (the lead complainant), the Town of York, the Town of Kittery, the Town of Eliot, Kathleen and Richard Boston and Tracey Lacasse. Those parties that did not sign stated that they did not oppose the Stipulation.

The parties to the Stipulation agreed to cooperate and support, when possible, CMP's efforts to obtain the necessary local, state and federal permits to build CMP's Preferred Option. The Stipulation also provides that, if CMP did not receive all necessary local permits by November 21, 2003, it had the right to request the Commission to rescind the Order Approving Stipulation.

By Order on August 14, 2003, we approved the Stipulation. *Order Approving Stipulation*, Docket No. 2002-665 (Aug. 14, 2003). We accepted the stipulating parties' recommendation that CMP's Preferred Option is the best project to meet the needs of southern York County and agreed with their conclusion that the proposed route is safe, reliable, reasonably sized and properly located. We noted that our Advisory Staff found Option 2 to be a reasonable solution to the electrical needs of the area. We found that the modifications that changed Option 2 into CMP's Preferred Option were reasonable and did not adversely affect electrical capacity and reliability, or safety.<sup>1</sup>

On September 23, 2003 and pursuant to 30-A M.R.S.A. § 4352 (4), CMP petitioned the Commission to grant a partial exemption from the Town of Kittery's Land Use and Development Code Zoning Ordinance (the Kittery Ordinance) to allow CMP to construct the new 34.5 kV transmission line and new substation in Kittery. CMP stated that the Kittery Ordinance defines transmission lines and substations as "essential services." However, the transmission line and substation are not specifically authorized land uses in the zones where CMP proposes to build them in Kittery and thus require a special exception from the Kittery Zoning Board of Appeals (ZBA or Board). In its written decision on September 11, 2003, the ZBA denied CMP's request for a special exception for the transmission line but granted the request for the substation. The ZBA concluded that CMP met all the conditions for a special exception for the transmission line except the provision pertaining to conservation of property values. In that regard, the ZBA decided that:

you [CMP] have met all the conditions for a special exception under 16.32.060<sup>2</sup> except for B.2, that the conservation of property values would not be maintained in certain areas in Kittery, namely, the properties of Deb and Gary Seward, Ridgewood Estates and where the line crosses Cutts Road and runs along Cutts Road for one-fifth to one-quarter of a mile, due to the presence of the poles.<sup>3</sup>

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<sup>1</sup> Even though CMP's Preferred Option was the most economic alternative, we also found reasonable the parties' agreement that CMP, and ultimately ratepayers, pay the additional cost of the underground/bridge attachment York River crossing. Although the more expensive York River crossing was for aesthetic reasons alone, in the unique circumstances of the river crossing at the beginning of the Maine Turnpike, we accepted that the State as a whole could receive considerable benefits from improved aesthetics.

<sup>2</sup> The section cited appears to be mistaken. The correct section is 16.24.060.

<sup>3</sup> The ZBA's September 11, 2003 decision letter is Attachment A to CMP's petition.

The ZBA made findings of fact to support its conclusion, namely that CMP proposed to upgrade an existing distribution line to a 34.5 kV line, as well as build a new line for part of the route in Kittery,<sup>4</sup> that the distribution line upgrade to a transmission line will require the replacement of 35 foot poles with 45 or 50 foot poles, and lastly, that the higher poles and new line will adversely affect property values for those properties mentioned above which will be next to the new transmission line.

CMP asks the Commission to exercise its authority to partially or wholly waive local zoning requirements because the exemption is “reasonably necessary for public welfare and convenience” under 30-A M.R.S.A. § 4352(4). CMP asserts that in the ZBA’s view, a special exception can be granted only if granting the exception will not adversely affect property values in the surrounding area. CMP argues that this interpretation requires the utility to prove a negative, that the new transmission line will not impact property values. As to this project in particular, CMP asserts that exemption from Kittery’s zoning ordinance is proper because of the prior complaint case. According to CMP, the Commission has already decided that the transmission line is needed, and that the particular route was recommended by the parties to Docket No. 2003-665 and accepted by the Commission as reasonable because the route balanced economics, environmental and land use impacts. CMP asserts that it requires an exemption from Kittery’s requirement that the new transmission line receive a zoning special exception because the ZBA’s interpretation of Kittery’s zoning ordinance makes it virtually impossible for a transmission line to meet the requirements of a special exception.

After notice was provided of CMP’s request, petitions to intervene were received from the Office of the Public Advocate, Laurie A. Downs, the Town of Kittery, Kerrin McColl, Dan Cusano, Brenda Ervin, Rich Ervin, and an organization called the Kittery Power Line Opposition (KPLO). All petitions were granted. The intervention by Kerrin McColl, Dan Cusano, Brenda Ervin, Rich Ervin and KPLO were consolidated by consent (hereinafter collectively referred to as KPLO).

Intervenors were given an opportunity to respond in writing to CMP’s petition. Laurie Downs, the lead complainant in Docket No. 2003-665, stated her opinion that CMP’s proposed route in Kittery does the most to conserve property values while at the same time meeting the electrical needs of the Town of Kittery because, for the most part, CMP will use existing utility corridors where lines are already located. She stated that the statutory authority of the Commission to override a zoning ordinance was intended for this kind of circumstance, where the safety, reliability and adequacy of the transmission and distribution system required the exemption.

The Town of Kittery asked the Commission to dismiss CMP’s petition. Kittery asserted that the Commission lacks jurisdiction to entertain CMP’s petition because CMP voluntarily applied to the ZBA for a special exception. Kittery reasoned that, 30-A

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<sup>4</sup> The new section will start off Picott Road, along the Maine Turnpike, crossing and going along Cutt’s Road, then along the Turnpike to York.

M.R.S.A. § 2691 and the Maine Rule of Civil Procedure, Rule 80B, provide the means for an applicant for a special exception to appeal a ZBA decision. Kittery argued that once CMP went to the ZBA for a special exception, it could not “end-run” the appellate process of the ZBA process by seeking an exemption from the Commission. In Kittery’s view, for CMP to seek an exemption from Kittery’s zoning ordinance, CMP had to seek one from the Commission directly, without first seeking a special exception from the ZBA. Once CMP went to the ZBA, CMP waived its ability to seek an exemption pursuant to 30-A M.R.S.A. § 4352(4).

The KPLO also asked that CMP’s petition be dismissed. KPLO argued that once CMP applied to the ZBA, and was denied a special exception, CMP must either redesign the project so that property values are not adversely affected or appeal to the Superior Court. In addition, KPLO asserted that the ZBA has not prevented CMP from building the line, but has simply required CMP to redesign a small portion of the line, the portions mentioned in the ZBA decision, to avoid harming those abutters’ property values. Since CMP can redesign the project, an exemption is not “reasonably necessary.”

CMP and the OPA responded to the motions to dismiss. Both asserted that the Town’s and KPLO’s dismissal requests are not supported by the language of the statute, or by prior decisions of the Commission interpreting or implementing 30-A M.R.S.A. § 4352(4). CMP pointed out that the language of the section does not impose any timing restrictions. Indeed, CMP asserted that the Town’s interpretation of section 4352(4) lacks common sense since it is illogical to argue in this case that an exemption from the requirement for a special exception was reasonably necessary before CMP even applied for a special exception from the ZBA.

On November 5, 2003, the Commission held a public witness hearing in Kittery. Some Kittery residents testified in support of CMP’s petition as they were concerned that electrical service may be inadequate without the transmission upgrade and that CMP’s proposed route reasonably mitigated land use concerns. Many Kittery residents testified in opposition to CMP’s petition, including some of the intervenors to the proceeding, Kerrin McColl, Dan Cusano, Rich Ervin and Brenda Ervin. These residents were concerned that the transmission line adversely affected their property and stated that utilities should be subject to the local zoning requirements like any other business or person. The Chairman of the ZBA also testified. In response to questions, he confirmed that he interpreted the Kittery Zoning ordinance to require the Board to deny the application. In his view, the Board lacked any discretion in the matter once the Board decided the transmission line would likely adversely impact property values.

On November 11, 2003, the KPLO filed a document “to expand on the points made” at the public hearing. The KPLO initially stated that “loop feeds,” while preferred, are not essential to providing adequate electric service because radial feeds exist throughout any electric system. The KPLO suggested that Option 3 remains the best solution to the southern York County electrical needs, and received the most public support at the public hearing in the complaint case. The KPLO also raised

environmental and technological concerns to assert that the Kittery line was not necessary.

### III. MOTIONS TO DISMISS

We deny the Town of Kittery's and KPLO's motions to dismiss. The underlying statute, 30-A M.R.S.A. § 4352(3), that grants the Commission authority to exempt a public utility from a local zoning ordinance does not support Kittery and KPLO's argument. Indeed, Kittery and the KPLO propose an interpretation of Title 30-A that makes it virtually impossible for the Commission to ever exercise the authority granted by section 4352. They suggest that CMP must petition and assert that it is reasonably necessary to exempt CMP from Kittery's zoning ordinance without first applying to the ZBA for a special exception. In general, and certainly in this instance, CMP cannot allege an exemption is reasonably necessary until it is denied a special exception.

The Kittery ZBA found that CMP had satisfied all the requirements for a special exception, except that the ZBA found that the transmission line would adversely impact property values and that the zoning ordinance required the ZBA to deny the special exception once the ZBA made such a finding. In pertinent part, the zoning ordinance states that, in deciding requests for special exceptions, the ZBA shall also give consideration, among other things to "the conservation of property values..." Kittery Zoning Ordinance, 16.24.060(B)(2).

There are 15 other factors to consider described in the ordinance. A reasonable interpretation of the Kittery ordinance is that the ordinance means that conservation of property values must be considered, but that such a factor is not a requirement that must be met. Only by applying to the ZBA could CMP learn of the ZBA's legal interpretation of the ordinance, and only by being denied by the ZBA could CMP allege that exemption from the Kittery ordinance is "reasonably necessary."

We also note that the interpretation of section 4352(3) advocated by Kittery and KPLO is contrary to dicta in prior Law Court and Commission decisions. See *Penobscot Area Housing Development Corporation v. City of Brewer*, 434 A.2d 14 (Me. 1981) (30 M.R.S.A. § 4962(1)(C), predecessor statute to 30-A M.R.S.A. § 4352(3), states a clear legislative preference for compliance with local zoning ordinances "to prevent capricious disruptions in planned community development . . ."); *Central Maine Power Company, Petition for Certificate of Public Convenience and Necessity to Erect Transmission Line*, Docket U. 3339 (August 11, 1987) (local zoning ordinance should not be disturbed unless utility can demonstrate clear need for exemption).

### IV. REQUEST FOR EXEMPTION FROM KITTERY ZONING ORDINANCE

The ZBA found as fact that the Swards and the Ridgewood Estates and Cutts Road property owners would experience a diminution in value of their property if CMP built the new transmission line. The ZBA considered a myriad of other factors and found all other conditions were satisfied by CMP. However, given the ZBA's legal

interpretation of the zoning ordinance, its finding about property values prevented CMP from obtaining the special exception.<sup>5</sup>

CMP proposes to replace an existing 12.5 kV distribution circuit, known as the Kittery Point Line that runs across the Seward's property, with a new 34.5 kV transmission line. The new line will require poles that are higher than those now supporting the Kittery Point Line on the Seward's property.

The Ridgewood Estates contains an existing 100-foot right-of-way with two transmission lines and one distribution circuit. The distribution circuit is the Kittery Point Line. One transmission line is a 34.5 kV line that serves the Navy Yard. The other transmission line is a 34.5 kV line that serves BOC Gases. A few hundred feet into the Ridgewood development, the Kittery Point line turns northward at a right angle, where it continues through the development as the only line in an existing 100-foot right-of-way. Once again, the Kittery Point distribution circuit will be replaced with a 34.5 kV transmission line. The new line will require poles that are 10 to 15 feet higher than the poles supporting the existing 12.5 kV distribution circuit.

The Cutts Road section of the project includes the portion of the new line that will not use an existing right-of-way. This new portion will run roadside for approximately 0.25 miles along Cutts Road. For the most part, there are no residences directly along this section of the Cutts Road. There are some residences adjacent to Old Cutts Road that is parallel to and about 100 feet east of Cutts Road. There are existing three-phase distribution lines and poles along Old Cutts Road, which will remain in place to provide local distribution.

For purposes of CMP's 30-A M.R.S.A. § 4352(3) request, we accept the ZBA's factual finding and legal interpretation of its ordinance. By enacting section 4352(3), however, the Legislature has directed the Commission to consider factors in addition to the land use concerns considered by the Kittery Zoning Board of Appeals. We have previously described that Section 4962(C),<sup>6</sup> the predecessor to section 4352 (3):

requires a general balancing of the local interests and broader ratepayer interests and a finding that the public welfare and convenience support the granting of an exemption from local requirements. The Commission must look beyond economic factors alone when exercising its authority under this section. Such a balancing necessarily requires the Commission to examine and consider the same types of factors that govern land use

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<sup>5</sup> According to the Chairman of the ZRA, once the Board found that property values would be diminished, it could not consider the need for the project or the availability of other routes.

<sup>6</sup> Title 30, section 4962(C). Title 30 was repealed and replaced by Title 30-A. The language of section 4962(C) is virtually identical to section 4352(3).

planning decisions albeit with substantial fact finding deference to the municipality.

*Central Maine Power Company, Petition for Certificate of Public Convenience and Necessity to Erect Transmission Line, Docket No. U.3339, Order at 6 (Aug. 11, 1987).*

The ratepayer interests in this matter have been well defined. The need for a new transmission line in Kittery has been established by means of an extensive, public proceeding. By approving the Stipulation in the complaint case, we found that the transmission line is needed, and that the line should be built to provide a loop feed for Kittery and York. CMP's Preferred Option proposed a route for the new transmission line in Kittery that is almost exclusively in CMP rights-of-way where electric lines are already present. By building in existing rights-of-way, costs are reduced and environmental damage and other adverse land use consequences are diminished. Indeed, the complaint case controversy arose in large part because of the inability to achieve the improvements in capacity and reliability within existing corridors.

Against this broad ratepayer need in Kittery and the entire southern York County area, we must balance the local interests as found by the Kittery ZBA. The ZBA found that the property values of certain of the abutting property owners would be negatively affected, and that the zoning ordinance prohibited the ZBA from granting CMP the necessary special exception. Thus, the local interest as determined by the ZBA is that transmission lines cannot be built if the line will diminish, to any extent, the value of any abutting landowner's property. The problem with the ZBA's local land-use policy is that it will effectively prevent CMP from ever obtaining a special exception and building a new transmission line. Because the local zoning ordinance will result in inadequate electricity service, the narrower local land-use interest must yield to the broader ratepayer interest.

It is important to note that the complaint case already served to balance local land use concerns with broader electricity service needs and to determine a reasonable route for CMP's new transmission line. By using, almost exclusively, existing transmission or distribution line corridor for the Kittery portion, CMP has minimized adverse environmental and other land use impacts, including minimizing the diminution of the property value of abutting landowners.

The Town of Kittery, Kerrin McColl and other members of the KPLO, and the public witnesses have not offered any alternative routes that satisfy the local interests served by the Kittery zoning ordinance and that also adequately and reasonably satisfy the electrical needs of the Town.<sup>7</sup> In their last submission, the KPLO suggest "Option 3"

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<sup>7</sup> The suggestion by KPLO that only a "small" redesign is necessary, one that avoids the ZBA-named abutters, is not accurate. Any redesign would have to involve many more abutters than just the Swards, the Ridgewood Estates and Cutts Road.



for the complaint case could satisfy both interests. We disagree. Option 3 was significantly more expensive than the "Preferred Option." As importantly, under Option 3, the new line in Kittery from the Bolt Hill substation to the new Kittery substation would be a radial line rather than a looped line.<sup>8</sup> The electric service for Kittery would not be as reliable under Option 3.

While we agree with the intervenors and public witnesses who stated that we should not override a local ordinance lightly, but only as a last resort, we find the ZBA's special exception decision to be precisely the kind of local zoning decision that the Legislature had in mind when it granted the Commission its authority under section 4352(4). Accordingly, we grant CMP's petition and exempt it from the provision in the Kittery zoning ordinance that requires CMP to obtain a special exception from the Zoning Board of Appeals before constructing the transmission line described as "CMP's Preferred Option" in Docket No. 2002-665.

We point out to CMP that in paragraph two of the Stipulation to the complaint case, the Company agreed to:

consider and, where practicable, ... implement measures to minimize significant adverse abutter, environmental and community impacts that might otherwise occur... [in regards to the Route 1 corridor in York.]

We believe that CMP should adhere to the principle described in paragraph 2, with the understanding that "practicable" includes considerations of cost, in relation to the entire southern York County transmission project, including Kittery.

Dated at Augusta, Maine, this 19th day of December, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Diamond  
   Reishus

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<sup>8</sup> The Swards property and Ridgewood Estates are located between Bolt Hill and the new Kittery substation. Option 3 has the same impact on Swards and the Ridgewood Estates as CMP's Preferred Option.

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.